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SEPARATION OF POWERS IN PERSPECTIVE

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INTRODUCTION

The concept of separation of powers is best understood within the context of its historical antecedent: At a point in the political development of the European States (The medieval period) states power was concentrated in the hands of all powerful monarchs. This power was randomly abused by the ruling potentates who in attempt to maintain their hold-on government and to stifle voices of dissent controlled all apparatus of government – the police, the judiciary and the executive. For example in Britain at this period, there existed the royal court known as the court of Star Chamber which had jurisdiction over all types of crime. These courts existed outside the normal common law courts and had the authority of the king to use torture, whipping, pillorying, branding, none slashing, ear-severing both as punishment and in the process of investigation. Roy ably combined with the religious authorities to unleash a reign of terror on the populace via the inquisition introduced by pope Innocent III of the Catholic Church. The Police for their part adopted torture and a wide network of spies and informants in their duties. Criminal law was ill-defined and varied according to the whims and caprices of the ruler. Often-times crime was coincident with such religious offences as Blasphemy and Atheism. It was against this background of rank abuse of power that the writings of some philosophers found a willing audience.

Emile Rousseau, Diderot, and importantly Montesquieu with his monumental place which he called the "spirit of the Laws" invoked Natural Law thesis was that all men were created equal before God and being creatures of the Almighty had certain inalienable (natural) rights accruing to them by virtue of their humanity.

Since the rulers were equally God's creatures, they had no right to ride rough-shod over the rights of their fellow human beings. The inalienable right of all humans were listed-

Right to life, liberty etc. all encapsulated in the modern day doctrine of fundamental Human Rights. As a Concommittant of this campaigns, Montesquieu wrote in the Spirit of the Law that everyman vested with power is liable to abuse it and carry his authority as far as it would go" To prevent this, he argued further, it was necessary from the nature of things that one power should act as a check on the other. Thus, the concept of separation of power can

be seen as part of the campaign for moderation and diffusion of the authority of the medieval rulers.

2. Its Classical Meaning and Practice

The concepts of separation of powers connects a diffusion of state power (authority) amongst different centre such that each is independent within its sphere and thus able to act as a check on possible excesses of others within their allotted sphere. It is thus possible to summaries the concept as providing for checks and balanced within the apparatus of government. In practical terms and in the context of modern governance, the concept has come to mean the division of powers between the recognized organs of government: the Executive, the Legislative and the Judiciary.

Inspite of this recognized tripartite division of governmental power particularly within western democratic practice, there is uniform application of the principle.

(A) The Britain Experience

In Britain, for example there cannot be said to exist a complete separation of powers.

(B) The Executive:

Minister and Cabinet. However, the Queen combines her roles as Chief Executive with those of headship of the judiciary and the legislative (Queen in Parliament).

The Prime Minister and other members of the Cabinet are also members of parliament. Indeed they cannot be members of the cabinet unless they have been elected as members of parliament from their respective constituencies. Obviously a strict application of the doctrine will exclude members of the executive branch from parliament.

Furthermore, and in the context of the principle of delegated legislative, members of the executive may be required to perform legislative functions. For example, when Local Government Councils pass some by-laws regulating matters under their competence such as opening and closing of markets, payment of radio and television licenses. Such by-laws constitute exercise of legislative powers by the executive arm of government.

The Judiciary:

Under the British Constitution, the upper legislative house, House of Lords is also the final court of Appeal in civil and criminal matters, while the Lord chancellor, who is the Head of the judiciary is also a member of the cabinet (executive) and also the presiding officer of the House of Lords in its legislative garb. This is a clear situation of overlapping

functions/powers the same individual being a member of the three organs of government. Again, the Queen is also the titular head of the British judiciary.

Apart from explicit exercise of legislative powers such as in the example given above; judges also make laws through their judgments. This in actual fact, was how the common Law of England developed and judges continue to legislate through their power of interpretation of statutes.

The Legislature:

The legislature is primarily for law making. But in British constitutional practice, members of cabinet include the prime Minister are elected from amongst its membership. In other words, the executive members are also members of the legislature. This does not demonstrate fidelity to the doctrine of separation of powers (see *Liyange v. Queen* (1967) A.C.259).

The practice of doctrine of separation of powers in Britain as highlighted above should serve to underscore the point made earlier in our introduction that the issue is not how "watertight" the division of powers is but how effective it is in balancing and checking the excesses of any of the organs of government. It is suggested that this basic function is not undermined in Britain practice because for example:

1. Membership of the legislature by cabinet members does not seriously detract from the independence of that body (legislatures). After all their number is minimal compared with the totality of legislative membership. Also the opposition members are present to act as a counterpoise to ganging up of pro-government members. In fact, it could be argued that this dual membership of the executive serves as a check when they are taken to a task by the members of Parliament over their conduct of executive business.
2. The Queen is merely a titular head of the legislature, the executive and the judiciary and the system is such that by convention she does not interfere in the activities of any of the branches.
3. This applies to other ministers of the crown who do not interfere with the courts.

(B) The American Experience

It has been said that the American practice of the doctrine of separation of powers shows a stricter adherence to its tenets. The tripartite division is encapsulated in the first three articles of the American Constitution 1787.

The legislative Articles comes first (Art. 1) and it confers powers of legislation on the American Congress (The Senate and House of Representatives). However, even here, the American President has the powers of legislative bills a situation much may be interpreted as giving the executive the power to legislate. The American Congress is completely independent of the Executive in the sense that no member thereof may also be a member of the executive branch. In 1975, Gerald Ford became President after the resignation of Richard Nixon. He automatically relinquished his membership of congress upon his confirmation in that office. Art 11 of the American Constitution vests the executive authority in his president who is elected independently. He need not even belong to a political party and he may appoint members of his cabinet from any sector of the population.

Art 111 is the judicial Articles which vests judicial power in the Supreme Court of the United States. Even though members of the court are assured as they can only be removed by impeachment. The fundamental issue of checks and balance is well taken care of under the constitution. Even though a president may veto a legislative proposal, his veto may be overridden by a two-thirds majority of the senate: where the legislature or executive exceeds its powers, the judiciary may invalidate such an act. *United States v. Richard Nixon* 418 U.S 683 (1974).

A special prosecutor appointed by the president himself to investigate a break-in at the Headquarters of the rival democratic party headquarters at the Watergates requested that the president surrender the tapes of conversation held at the Presidential office on the ground that some of the conversation recorded on tape could be relevant to criminal trial of one of the Watergate conspirators. Nixon claimed executive privilege over the tapes.

The Supreme Courts held *inter alia* that such claim would upset the constitutional balance of workable government and impair the roles of courts and the president as provided for in Articles 11 and 111 of the constitution".

(C) Separation of powers in Nigeria

The concept of separation of power was not known in the traditional African Society, Nigeria in fact typified the two streams of political organization indigenous to Africa - The kingly societies and the Acephalous societies. In the kingly societies of Nigeria to found among the Yorubas, Benin, etc. a powerful ruler the Oba was surrounded by Chiefs or traditional cabinets whose function was to advise the Oba and ensure that deposition did not act in since the Chiefs were in most cases descendants of the traditional holders of the title they did not owe their appointment to the king and were more effective as a

counterpoles to dictatorial tendencies e.g The Oyomesi in Oyo kingdom and the Ogbonis in Egboland. The Acephalous societies, (E.g. Ibos, Tivs) for their part were arranged in an egalitarian order. There were no devine rulers but the society was controlled by the Age grade system with a group Elders topping the hierarchy. In the Northern parts of Nigeria, the Emirs and other religious rulers controlled the society. The Emir were more powerful than their Southern counterparts but any tendency towards dictatorship or despotism was neutralized by the influence of the Islamic religion which preached charity and fair play by rulers to their subjects.

The doctrine of separation of power in its modern connotation became a part of Nigerian constitutional practice from independence. The independence and Republican Constitution followed as British practice while the constitution 1979 law followed the presidential system as practiced in the United States of America. The 1989 Constitution is also modelled on the 1979 constitution in this regard. Section 4, 5 and 6 of the 1979 Constitution provided for a tripartite division of power amongst the legislature, the executive and the judiciary respectively. The Judicial powers of the Federation were confirmed in *Attorney of Bendel State & Ors. V. Attorney-General of Federation* (1981) 10 S.C. The Supreme Court declared as unconstitutional the signing into law of the Revenue Allocation Bill by President Shehu Shagari when the procedure for validity passing the law by the National Assembly had not been complied with.

The striking down of the bill underscore the separate roles of the three organs of government in particular set of the Supreme Court as the final arbiter.

Again in *(Balogun) V. A.G. Lagos State* (1981) 2 NGGR 589. The Judicial articles was upheld when a law creating more local governments in Lagos State was struck down for non-compliance with a requirement that such creation be proceeded by a judicial enquiry. The Court held the law to have contravened the doctrine of separation of powers.

See also: *(Garbs v. University of Maiduguri)* (1986) 1 NWLR 551 where the decision of the university of Maiduguri to rusticate some students was declared null and void having been predicated on a finding of guilt of the student by a University panel which tried them. Since judicial function rests in the Courts, the Supreme Court held that performance of judicial functions by an administrative body was ultra- vires the constitution.

See Further: *(A.G Uyo State V. Adeyemi & Urs)* (1982) 3 GCLR 846 the sanctity of Executive power from encroachment by the legislative was upheld in *(Governor of Kaduna State v. House of Assembly of Kaduna State* amended the local Government Law of 1979 to give itself the power(hitherto conferred on the Governor) to sign the Local Government

Bill into Law. Held: the function of signing a bill into Law rightly belonged to the Executive. Legislative autonomy within its allotted sphere was affirmed in Senator Abraham Adeanya v. President of Nigeria (1981) 2 NCLR 358.

Senator had challenged the appointment of Justice Ovia-Whiakay as FEDCCO boss

After he had been confirmed in that position by senate. The Supreme Court held that the matter of confirmation was an internal affairs of senate and that the courts had no jurisdiction to interfere as they were precluded by respect for the doctrine of separation of powers.

The same principle was applied by Adefarasin of Lagos High Court in the case of (Senator B.C. Ukwu v. Senator Joseph Wayas (1581) 2 NCLR 522 where ukwu sued for the annulment of an order removing him as NPP Senate Leader on grounds that it contravened senate standing Rules. A matter within legislative competence.

But contract: (Aliyu Makarfi v. Ume Ezeoke (1981) 2 NCLR 434 where the speaker of the House of Representative (Ezeoke) suspended Makarfi from all standing committee e.g. The House on that Makarfi had been suspended by his party -PRP. Plaintiff challenged his removal from House Committees and the Speaker contended that the court had no jurisdiction. The Speaker preliminary objection was dismissed and the court proceeded to try the case.

Unongo v. Ajau (1983) 2 S.C NLR 332.

Section 4 (8) 1979 Constitution "save as otherwise provided by the Constitution the exercise of legislative powers by the National Assembly or the House of Assembly shall be subject to the views of the courts of law and judicial tribunals established by law and accordingly National Assembly shall not enact any law that ousts or purports to oust the jurisdiction of the courts.

Overlapping of Powers in Nigeria

As in other jurisdiction, there is no watertight compartmentalisation of powers in Nigeria, indeed, what we have are overlapping powers.

The strict function of the JUDICIARY as provided for under section 6 interpretation of laws passed by the National Assembly. However in the course of performing their interpretative role, they do end up "making" laws. For example in (Mandara v. A.G. Federation) (1984) 1 S.C. NLR 311 the court held while a statute is capable of two

meanings, the court should adopt the interpretation which will not defeat the intention of the law maker.

Again in (Jammel v. A.G. B) (1973) 11 S.C. 77 the Supreme Court held that where the language used in a statute is capable of more than one interpretation, the court should discard the more 'natural meaning if it leads to an unreasonable result and adopt that interpretation which leads to a reasonable practicable result. In both these cases the subjectivity of the interpretational power clearly demonstrates that the law may take on a new character dependent on the interpretation given to it by the courts.

Furthermore, the Judiciary may have to perform legislative functions to enhance its judicial powers. For example, the Chief Justice of the Federal was empowered by the Constitution of 1979 to formulate rules of procedure for the enforcement of Fundamental Human Rights guaranteed under that constitution.

Pursuant to this authority, therefore the then Chief Justice of the federation Hon. Justice Atande Fatai- Williams passed the fundamental Rights (Enforcement Procedure) Rules 1979 under his own hand.

The Executive arm of government of laws is charged mainly with the execution of laws passed by the National Assembly (See Sections 5 of 1979 and 1909 Constitution). However, the Executive (President) may make laws in certain situations, such as his power to make regulation (laws) for granting special immigrant status with full residential rights to non-Nigerian spouses of Nigeria citizens. Note however that such regulations that must be laid before the National Assembly (See. Section 27 of 1979 Constitution).

The President may also veto a bill passed by the National Assembly if he does not agree with its provisions. This power of veto may be interpreted as a law making power. The fact that such a bill may be represented and passed by two-thirds majority of the National Assembly does not detract from the essential law-creating nature of the power of veto.

The Executive arm also performs quasi judicial functions such as, for example, when a university constitutes panels to hear cases of misconduct by students e.g. the Examination Malpractices Committee. See the case of Garba v. University of Maiduguri where the exercise of judicial powers by the University of Maiduguri was declared ultra-vires the constitution. Note that the decision merely quashed exercise of criminal jurisdiction by the Disciplinary Panel. The Supreme Court did not declare exercise of quasi-judicial power absolutely illegal.

The primary duty of the LEGISLATIVE is to make laws yet this power dovetails into the quasi- executive realm when the legislature exercise its power under the Constitution (Section 82) to conduct investigations with a view to exposing "corruption inefficiency or waste in the execution or administration of laws within its legislative competence.

Furthermore, parliament may in certain circumstance perform judicial or quasi-judicial functions such as when it punishes breaches of its privilege or contempt of the House and performs investigatory rules. An example of this situation may be found in the Nigerian Second Republic when the senate invited the then editor of Daily Times, Tony Momoh to testify before it on the source of certain information published in the Grapevine Column of the newspaper. When Momoh challenged the authority of the senate to do so in Momoh v. Senate (1983) 4 NCLR 269 interpreting section 82 of the 1979 Constitution, the court of Appeal held that the power of the senate, though circumscribed with regard to the facts of the present case, yet existed to constitute a proper and lawful investigation to expose corruption, inefficiency or waste committed by government departments or authorities". It is submitted that such power in a legislative body is quasi-judicial in nature and exemplifies the overlap in power between the legislature and the judiciary.

Again in Adikwu v. House of Representatives (1982) 3 NCLR 394 Balogun, J sitting at an Ikeja High Court declared as unconstitutional null and void or invitation by a House of Representatives Committee to Adikwu, then editor of the Sunday Punch Newspapers to reveal the source of his information which led to the publication of a news item captioned "FRAUD Legislators claim salaries for Fictitious Staff". The House had purported to invoke its investigatory powers under section 82 of the laws 1979 Constitution. The relevance of both decisions is that had the issue in dispute fallen under those for which the legislature could invoke its powers under section 82, we would have been able to observe both arms of the legislature performing quasi-judicial roles.

Separation of Power in a Federal Get Up

Whilst the classical interpretation of the doctrine of separation of powers focuses on the division of powers between arms of government, the "Federalist" interpretation of the concept relates to the interrelationship and division of powers amongst the tiers of government – Federal, State and Local Government (See Sections 2, 3 and 7 of 1979 Constitution respectively). "Whilst the Constitution recognizes the need for separateness or some degree of autonomy amongst the various levels of government, it also recognizes the need for interdependence and harmonious and effective government if the Nigerian

Federation is to be a worthy one. (Abiola Ojo Separation of Powers in a Presidential System of Government")

The modus of effecting separating the powers of the tiers of the government is through the creation of two lists – Exclusive and Concurrent Legislative Lists (Sections 4 (2) and 4(4) and Part 1, Section 2 and Part 111 Section 2 respectively).

The Federal Government has exclusive power to legislate on matters on the Exclusive List. The States share legislative powers with the Federal Government as on matters on the Concurrent List (N.B. in case of conflict the Federal legislation supersedes the state legislation. See for example ATTORNEY GENERAL OF OGUN STATE v. ABERUOGBA (1985)1 NWLR (Part 3)395.

The Ogun State government imposed sales tax on purchases of specified goods and services. Aberuogba challenged the constitutionality of the law contending that it was a matter within federal legislative competence.

HELD: Section 3 (1) of the Ogun State sales Tax Law is to for as it imposes sales tax on products brought into Ogun State is unconstitutional by offending Section 4 (3) of Constitution.

The powers of a Local Government are specifically enumerated in Fourth Schedule to the 1979 Constitution.

The Impact of Military Rule on Separation of Powers

The Usurpation of political power by the military at different times in the political life of Nigeria has had an impact on the concept of separation of powers. The impact can best be assessed against the background of the usual divisions of powers:-

1. The Executive

Military rule by its very nature is based on a hierarchical command sametime. This is in sharp contrast to the principle of separation of powers which thrives on diffusion of power, functions and functionaries.

The Head of Federal Military Government is the Chief Executive. However he also doubles in varying degrees has the Chief Legislative officer as he heads the Military joints that legislates for the country. The power of the Commander-in-Chief has varied with each military interregnum under the Ironsi/ Gowon Regime, the Commander-in -Chief

exercised his powers in consultation with the members of the Supreme Military Council (SMC).

At the State level, the military governor was responsible for the execution of the polices of government. In an ideal setting, the governor ought to be "supreme" in the exercise of the powers under his sphere of authority- the concurrent and residual lists. However the fact that a military governor is appointed and is removable by the Commander-in-Chief make independent action virtually possible.

This is a fundamental breach of the separation of powers principle.

At no other time in the history of military rule has the Commander-in-Chief concentrated nomuch powers in himself then under the Babangida military administration.

The First Military "President" of Nigeria under the Constitution (Suspension and Modification)

(Amendment) Decrees no.17 1985 has all

- All the powers of a civilian president under the 1979 Constitution;
- Has operational control of the Armed Forces;
- Has exclusive responsibility for the appointment of the Chief-of- General Staff (CGS) in constraint to the position under previous military regimes where the No.2 man was appointed by the Supreme Military Council.
- President appoints Armed Forces Chiefs the inspector General of Police, the Director of Nigerian Security Organization (now State Security Services)

Despite the fact that decree 17 of 1985. constitution (Suspension & Modification) (Amendment) Decree vested the Armed Forces Ruling Council with the sole authority of appointing the president and Commander-in -Chief (See section 9 of the Decree) the President proceeded in December 29, 1989 to dissolve the same Council that appointed him.

In Fawehimi v. President of Federal Republic of Nigeria, a Lagos based legal practitioner challenged the power of the president to dissolve the AFRC. He contended that such an exercise had no support in law (Decree 17) that there was no evidence that president consulted other AFRC members before taking that action. The President responded that Decree No. 17 ousted the jurisdiction of the courts to inquire into the exercise of his powers.

HELD: President is above quary No.1 could enquire into whether the President consulted anybody before the exercise of his powers.

Thus in terms of executive authority military governors have been divested of executive authority. All such delegation could be varied or revoked at any time. This Military governors are mere agents of the central government in relation to their executive powers.

Federalism & the Executive

"Federalism and military administration are uncomfortable allies" (A. Ojo Constitutional Law & Military Rule page.172) Under Military Federalism loses its essential character to become Unitarianism due to the hierarchical and authoritarian nature of military rule. (Ironsi regime January – July 1966 was the most sincere in terms of its readiness to accept that Unitarianism was the basis of military rule. He promulgated the constitution (Suspension & Modification) Decree No.5 1966 which introduced a unitary Government. Thus complicit affirmation of a defacts situation however created problems for Ironsi and ultimately led to his ouster. However military role so far has not negated his essential character.

The Federal Military Government can legislate on any subject for any part of the country. The Military Governors may annoy legislate on matters on the Concurrent list with prior consultation with the centre. Any conflict in legislation (Federal and State) would naturally be removed in favour of the Federal Law. The centralization of legislative power in a federation obviously leads to a neutralization of the concept of separation of powers.

2. The Judiciary

The impact of military rule on separation of powers with relation to the judicial functions has attracted the widest criticism. The Judiciary, it is often said is common man. The need for an impartial judiciary is even more pressing in military dispensation. Despite this fact or perhaps because of this, successive military administrations in Nigeria have attempted to emasculate the judiciary and thereby transgress against the concept of separation of powers. Some relevant issues are so follows:-

i. Appointment of Judges

The appointment of superior court judges headquarters always been done at the Federal level. Before the advent of Babangida it was by the Supreme Military Council in consultation with the Advisory Judicial Committee (AJC). Even though the SMC is an

executive and legislative body the number and composition of its members ensured a measure of diffusion of decision-making.

However, under the Babangida administration superior court judges are appointed by the President and Commander-in Chief. This amounts to too much concentration of power.

ii. Tribunal System

The military of tentimes believe that the normal courts are slow and ineffective hence they have set up a parallel system of courts – the Special military Tribunals to adjudicate on matters ranging from Armed Robbery, Corruption, and Protection of Public Officers etc.

Under Buhari, these tribunals were presided over and composed mainly of military personnel with a judge acting merely as an adviser on legal matters.

The Babangida Regime has changed ways to be what by appointing judges as chairmen but this has not gone far enough. Research shows that the military tribunals convict in 95% of cases brought before them raising fears that perhaps their decisions are influenced by the executive branch.

In Wahab Akamu v. Attorney-General of Lagos State Suit No.8/568/91 the two plaintiffs brought an injunction restraining the Lagos State Military Governor from executing them because the Armed Robbery Tribunal before which they had been tried was compared in such a manner so to offend the doctrine of separation of powers contrary to African Charter on Human and peoples Rights.

On November 18, 1991 the Lagos State High Court granted an interim injunction restraining the execution of the applicants until the substantive suit is heard.

iii. Ouster Clauses

Apart from interjecting armed forces personnel into the judicial system, a favourite modus of military subversion of separation of powers is the total ouster of the jurisdiction of the courts.

We remember of course that section 6 confers the judiciary with the authority to determine and adjudicate on disputes between individual and government. This adjudicatory power is reinforced by section 33 of the 1979 Constitution which deals “Fair Hearing”.

Section 42 of 1979 Constitution reaffirms the jurisdiction of the High Courts on issues of Human rights.

However it is the practice for military regimes to preclude intercession by the courts through the insertion of ouster clauses in their legislation examples:-

Constitution (Suspension and Modification) Decree No. 1 of 1966, Public Officers (Protection Against False Accusation Decree No. 4 1984, Recovery of Public Property (Special Provisions) Decree No. 3 1984 etc.

The response of the courts have varied to ouster clauses in; Molokwu v. Commissioner of Police, Okuowo v. Commissioner of Police M/476/89, Ozekhome v. President, Gbenga Kamolafe v. A.G. Federation.

The Courts found ingenious ways of sidetracking the outer clauses. But not as in Wang Chung Yau v. Chief of Staff Supreme Headquarters where the court of Appeal held that courts should blow suited trumpets on matters of Human rights.

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RULE OF LAW

The separation of powers between different organs of government is another dimension to the Rule of Law. The doctrine of separation of power aims to provide checks and balances within a political system such that abuse of power is foisted. It is important to note separation of powers as a component of the Rule of Law. The doctrine of separation of powers is a mechanism for the attainment of the Rule of Law.

THE RULE OF LAW UNDER MILITARY ADMINISTRATION

“Military administration” encompasses the totality of Nigerian experience of the military rule. The military coup of the Major Chukwuma Kaduna Nzeogwu heralded the coming of the military into the political life of Nigeria in January 1966. It was a partially successful coup. He never assumed the mantle of leadership of the country but inexplicably surrendered to Major General Aguiyi Ironsi was in the saddle for barely six months before he was killed in a counter-coup and replaced by General Yakubu Gowon in July 1966. Gowon was in power for a record of eight years aided by a successfully fought civil-war in 1966-70 but he was later overwhelmed by corruption and drift. His administration fell and was replaced by the progressive-oriented General Muritala Mohammed in 1975. Muritala was assassinated 100 days later by a small rabble of mutineers. His erstwhile deputy, General Obasanjo subsequently presided over a short transition to the Second Republic in 1979.

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Democratic rule was shortlived and the Army against intervened in the political process in December 1983 to "stop corruption and drift" by the Sharagi led civilian regime.

Buhari/Idiagbon's military administration was noted for its draconian approach to the solution of the Nigeria's multifarious political ills and thus provided a ready excuse for w General Ibrahim Babangida to effect another change of governtment on the ostensible platform of championing human rights.

Assessing the observance of the "Rule of Law" by the Military must be premised on an understanding of the contents of the Rule of Law. The rule of law represents man's persistent appeal over the ages for the subjection of government to reason and legality. From the ancient philosophy of Aristotle preferring "The rule of law to the man; to the libertarian ferment of the 18th century that gave forth the subjection of the monarchs to the to the supremacy of the people in England, France, Italy and the rest of Europe; the central theme has been in line with the tripartite postulations of Prof. A.V. Dicey as - lack of arbitrariness in government equality of the rulers and the ruled before the law; and the supremacy of "people's power"

Later elaborations of the concept of the Rule of Law by the International Commission of Jurists conferences in Athens, New Delhi and Lagos in 1955, 1959 and 1961 respectively embraced human right, independence of the judiciary and later social and cultural right. These sentiments were later written into international conventions such as the Universal Declaration of Human Rights 1948 the European Convention on Human and Peoples Right 1953 and the African

Charter on the Human and Peoples Rights. Many written constitutions have adopted similar provisions as in Nigeria and the United States of America.

We intend consequently to base our analysis of military impact on the Rule of Law under the following broad headings:

1. Subversion of the Judiciary

- a) Ouster clauses
- b) Military tribunals
- c) Disobedience of Court orders

2. Transgression of Human Rights and Due Process:

- a) Detention Decrees
- b) Fair Hearing (Due Process)
 - Secret trials
 - Right to counsel

3. Oppressive Criminal Justice System

- a) Onus of proof
- b) Accomplice evidence
- c) Excessive Punishment
- d) Retroactive Criminalisation.

4. Arbitrary Government

- Maroko
- Lynching
- Vice-president
- Secret Ballot Laws

SUBVERSION OF THE JUDICIARY

The military have undermined the Rule of Law by subverting the judiciary. We recall that the independence of the judiciary is one of the pillar of the Rule of Law was identified at the International Commission of Jurists Conference in New Delhi 1959: The State and the individual are in a perpetual state of contest. It is the judiciary that is the judiciary that is the arbiter of the expected conflicts. Military rule in Nigeria has witnessed an extensive use of ouster clauses in decrees, the establishment of a parallel system of court – The military tribunals and persistent refusal to obey order of courts of law.. We discuss these issues in turn:

i. Ouster Clauses

The insertion of ouster clauses in military legislation has been a classic device of military administration, aimed at excluding the courts from assessing the legality of their acts. The list is extensive and straddles all military administration:

The Constitution (suspension and Modification) Decrees No. 1 of 1984 a typical tool of legalizing an incoming military administration contains ouster clauses in these term:

"No question as to the validity of this or any other decree or of any Edict shall be entertained by any court of law in Nigeria"(s.5)

Variants of this can be found in State Security (Detention of Person) Decrees No. 2 (s.4(1)); the Recovery of public property (special Military Tribunals) Decree No. 3 of 1984 and subsequent amendments by the Babangida military government.

Normally, in a democratic setting there is a presumption against ouster of the jurisdiction of courts in deference to the principles of separation of power and the power of "judicial review"

However, even with Military decrees, there have been courageous attempts to pierce the veil of ouster clause by invoking the jurisdiction of the courts to ensure that the acts complained of conform to the enabling decrees. With this test many executive acts have proved high-handed and arbitrary and indeed contrary to the terms of the enabling decrees.

Thus in:

James V. Commissioner of Police (Suit No. AD/133/M/84) p of law of Habeas Corpus xx by Gani- Fawehinmi (hereinafter Habeas corpus okeowo v. Inspector-General of Police, Solarin v. Inspector- General of Police Olawepo v. Attorney-General of Federation). The courts were willing to assume jurisdiction despite the ouster clauses.

Candido Johnson aid in solarin's case (supra). It is true that section 4(1) of the decrees excludes proceedings in respect of anything done or intended to be done in pursuance of the decrees, that merely grants immunity to the donee of the power in the due exercise of it; but does not preclude the court in its jurisdiction from ensuring that the power is properly exercised.

Note: Aniministic v. Foreign Compensation Commission (1969) 2 A.C. 147 which formed a reference point in all subsequent Nigerian cases. In that case an English Act of 1950 has sought to exclude the jurisdiction of the courts from determining the validity of a determine whether a purposed "determination" was in fact a determination in law.

See further the case of: Wilson v. Attorney-General of Bendel State (1985) 1 N.W.L.R (pt. 82) 280. Military Governor of Ondo State v. Adewunmi.

On the other, there are those line of case where the court have too readily in our respectful opinion succumbed to the ouster of its jurisdiction by the military. A notable case is Wang Ching Yao v. Chief of Staff, Supreme Headquarters where the Court of Appeal presided over by Ademola CJA directed courts to "blow muted trumpets" in matter concerning military decrees.

ii. Military Tribunals

The establishment of a parallel system of court by successive military administration to try ordinary criminal cases under refurbished nomenclature and stiffened penalties has been the single most effective subversion of the Judiciary and ultimately the Rule of Law. The composition of the tribunals, their rules of procedure and lack of appellate avenues contradicted all accepted norm of justice. For example, under the Recovery of Public Property (Special Military Tribunals) Decree No. 3 of 1984, the Chairman of the Tribunal was to be a serving member of the Armed Forces not below the rank Major-General. The lack of opportunity for appealing to a higher forum was another factor why military

tribunals particularly of the Buhari/Idiagho era were detested. Instead of genuine appellate avenues, many decrees of this period provided for confirmation or disallowance by respective state military governors — (in armed robbery cases); the Head of the Federal Military Government or the Supreme Military Council in the respect of others. Abiola Ojo has suggested, reasonably in our view that the confirmation procedure "are a serious reduction on the importance, status and public esteem of the tribunal. The fact they cannot give binding decisions has reduced them to merely investigatory advisory or deliberative bodies". (see A. Ojo constitutional Law & Military Rule p. 276). Because the review exercise of SMC is done in private. The processes of arriving at any decision is shrouded in secrecy. "the danger in the process is that it creates room for rumours....."

Only the Recovery of Public Property (Special Military Tribunals Decrees No. 3 of 1984 was free from the requirement of confirmation or review by the S.M.C. Ironically when Babangida later amended the Decree to allow for appeals to the Special Appeal Tribunal amidst wide applause, no one thought to criticize the inclusion therein of provisions for confirmation of the séances of the Special Appeal Tribunal by the Armed Forces Ruling Council AFRC). See: F.R.N.V Tam David-West.

Babangida initial acceptability by Nigerians is not unconnected with disenchantment with Buhari's tribunals. It in fact led to an unprecedented protest by the Nigerian Bar Association and a directive to their members not to defend any persons charged before these tribunals. The Babangida Military Administration later restructured the tribunals in such a way that serving or retired judges were substituted for the military chairman of tribunals (See Recovery of Public Property

(Special Military Tribunals) (Amendment) Decrees created avenues for appeal to the Special Military Tribunal amongst other reforms of that Law to be discussed under appropriate sub-headings in subsequent pages.

iii. Disobedience of Court Orders

Despite protestations to the contrary by paid apologists and government lawyers, one abiding characteristic of Military Rule is its utter disregard for the Institution of the judiciary as often demonstrated by its disobedience of court orders:

In Governor of Lagos State v. Ojukwu, Justice Kayode Eso decried the excesses and executive Lawlessness of the Akingbe Lagos State government. Chief Ojukwu's house at Ikoyi has been taken over during the civil war. In 1984 he returned to the house after paying the sum of N90,000 to the State government for an unexpired lease. About a year later he was served with a Notice of Eviction by the same government. He applied to court for an Interim restraining order and it was granted. However the court refused to issue an interlocutory injunction. Ojukwu appealed to the court of Appeal. Whilst the appeal was pending, the Lagos State government forcibly ejected Ojukwu with armed soldiers. The Court of Appeal directed that the State government could not resort to jungle the law and that it should allow Ojukwu to return to the house pending the outcome of its decision. The State government refused to comply with the Court order against which it Lagos State Government appealed to the Supreme Court. The outcome of the Lagos State Government's appeal was the strong rebuke of Eso quoted earlier.

A similar unwillingness to abide by the consequences of an appeal led to the execution of a condemned armed robber while his appeal to the Supreme Court was pending this was in the case of Bello v. Attorney General of Oyo State (.....) the state Ministry of Justice claimed "administrative error". If Bello's case was due to administrative error and not deliberate flouting of a court order, the same cannot be said of the conduct of the Military Governor of Bendel state in the case of Kingsley Izedowen v. Military Governor of Bendel State (Reported in Executive Lawlessness I Babangida Regime, Co publication March 1991 p. 12.)

In 1995, Kingsley Izedowen was convicted in Bendel state for the possession of Sinrens. He was sentenced to a term of 10 years imprisonment or a fine of ₦2000. He paid the fine and was released from custody. He was re-arrested in January 1996, this time on a charge of armed robbery. He was discharged and acquitted by a Robbery and Firearms Tribunals on 23/2/87.

While the armed robbery trial was pending he was transferred from "Awaiting Trial" section to 'convict' section. The Prison authorities alleged that the Military Governor of Bendel state has signed his remand (imprisonment) warrant stating that he must pay ₦20,000 fine instead of ₦2,000 imposed by the court for his firearms possession charge or serve the 10 years jail term. Therefore after his acquittal on the armed robbery charge, his captors refused to release him.

Izedomwen filed a suit in Federal High Court for a declaration that the Military Governor has no power to increase his fine from ₦2,000 to ₦20,000. Ojutalayo J. of Federal High Court in Benin City in a judgment delivered on 19th

September 1988 ordered Izedomwen's immediate release from prison. Kingsley Izedomwen was despite Ojutalayo order transferred to Port-Harcourt prison and is yet to be release.

In Aka Bashorun v. Governor of Gongola State (1991) 1 NWLR (pt. 163) p.12. Two Local Government Chairmen has successfully challenged irregularities in the December 1989 Local government election in Numan and Bayo-Belewawa Local Government Council in Gongola. The Yola High Court declared both duly elected. The Governor of Gongola, wing Commander Isa Mohammed, refused to swear them in the ground that only the National Electoral Commission (NEC) had the authority to do so. The Yola Branch of the Nigeria Bar Association (NBA) boycotted local court to protest the Governor's decision. Later the NBA parent body declared a week's boycott of all court's across the country. Three day into the boycott Governor Isa Mohammed sought and obtained an injunction from the Kano Division of the Federal High Court restraining of the NBA from continuing with their strike. The NBA called off strike in obedience to the court but appealed the order on the grounds that the Kano Federal High Court has no jurisdiction over the matter. The Court of Appeal so ruled.

Gani Fawehinmi v. Attorney-General of the Federation on 27th September 1988, Gani's passport was seized as he returned from a medical trip abroad by the State Security Service (SSS) AGENT. Gani filed a suit in a Lagos High Court demanding its return. Justice Moni Fafiade ruled on 13/2/90 that Gani's passport should be returned to him. The SSS appealed against the order and applied for its suspension by the Judge. The Judge refused to allow suspension of the order because the SSS was not empowered to confiscate paqssports. The Federal

Government refuse to comply with the order until October 1990 when information Minister Alex Akinyele personally delivered the passport at Gani's Chamber stating that the Federal government was returning the passport as an act of clemency.

(This case is extracted from Executive lawlessness in the Babangida Regime March 1991, A CLO publication p. 6. In Prince Adedoyin v. Military Governor of Ogun State on the 13th July 1990, Justice Fred Odubiyi of Abeokuta High Court granted an application for an interim injunction restraining the military Governor of Ogun state Navy Captain Lawal from installing Michael Sonariwo as the new Akarigbo of Remo pending the determination of the substantive action. A few hours after the decision, the Governor enacted an Edict setting aside the court order and installing Sonariwo the Akarigbo of Remo.

Besides those listed above, court orders have been routinely disobeyed in matter concerning students. In July 1990, the authorities of the College Of Education refused to comply with the order of the High Court that the 14 students rusticated should be readmitted. Also in late 1991, an Ile-Ife High Court presided over by Justice Kayode Ibidapo-Obe directed that some students of the Obafemi Awolowo University who had been rusticated should be readmitted pending trial of cases to enable the students take part in the semester examinations. The University authorities refused, alleging that only the University Council could vary the rustication order.

II. TRANSGRESSION OF HUMAN RIGHTS AND DUE PROCESS:

Military administrations are notorious for the wanton abuse and disregard for human rights and process of law. The issues of Detention and lack of fair hearing will be in focus.

Detention Decrees

Military administrations have always felt insecure and unstable. Hence they are very quick to clamp into detention on the slightest pretext usually invoking "State Security" and "National Interest" justification. No Military administration in this country has omitted to pass detention decrees in one form or another. However, the justification of national interest has proved to be more than a smokescreen to conceal often base personal motives corruption and overzealousness.

In Re Mohammed Olayeni, Between 1968 and 1969, the applicant and some other army contractors were arrested and detained under the authority of the Nigerian Army for having received money for goods not supplied.

The government invoked the Armed Forces and Police (Special Powers) Decree No. 24 of 1967. They were later released on condition that they refund the money installments. Detention of persons may be affected through the instrumentality of diverse legislation as the CLAYORI case illustrates. Another is the Trade Dispute (Emergency Provisions) (Amendment) Decree No. 53 of 1969. However, the most common and notorious in recent times has been the State Security (Detention of Person) Decree No. 2 of 1984 providing that the chief of staff, Supreme Headquarters may, on being satisfied that a person is or recently has been concerned in acts prejudicial to state security or has contributed to the economic adversity of the nation order his detention in civil prison or Police Station. The Buhari variant was different from that of his predecessors. Under Ironsi, the Head of State had to personally sign every detention order in respect of every person intended to be detained. This helped to curb possible abuses and ensure

minimum invocation of the detention decree. In Buhari and Babangida administrations abuses are rampant as they were in the latter days of Gowon's rule. Important issues for consideration in the matter of detention decrees are a scrupulous adherence to the terms of the enabling decree regarding:

Place of Detention

Agbaje v. Commissioner of Police

Okeowo v. Inspector-General of Police

Olawepo v. Federal Attorney-General

Komalafe v. Federal Attorney-General

In all these cases, the detention orders were nullified because the detainees had been kept in places not within the contemplation of the enabling law.

Grounds on which the Chief of staff can detain:

Lamina Arowaye & Ors v. Inspector-General of Police (Suit No. ID/14M/84 of 6th April 1984) where the court held that the suspect must have transgressed against state security and not merely public order.

Czekhome v. President of Nigeria Where the court in interpreting the parameters of Decree No. 2 held that it could not be used to detain persons accused of common crimes.

(ii) Fair Hearing

The ramifications of fair hearing are amplified in section 33 and 35 of the 1979 and 1989 Constitutions respectively. Two underlining concepts of fair hearing here however Audi Alteram Partem (Hear the other side) and nemo judex in causa sua (A man should not judge his own cause). We had considered the implications of tribunals under the section military subversion of the judiciary.

It is however worthy of emphasis that the military tribunals undermine the Nemo judex rule by constituting military personnel as adjudicators over disputes between the military government and other citizens. The situation becomes more comical and ironical when the military have to try some of its own dissident personnel after failed coups. Secret trials, denial of right of representation become routine as in the secret trial by the Buhari Administration of 1985 Vatsa coup and the Gideon Orka-led April 22nd 1990 coupists. These trials and the bloody executions that followed it have been rightly condemned as flagrant human rights violations.

(iii) - OPPRESSIVE CRIMINAL PROCEDURE

The treatment meted out to a society's deviants is sometimes a barometer of freedom and Rule of Law when the monarchs of the pre-18th Century held sway, the criminal justice system was very oppressive and wicked: Nose slashing, burning at the stake etc were common penalties for hearsay and blasphemy. The military, attitude to criminal justice at least intermittently, would appear reminiscent of the level of those medieval criminal justice.

(i) Onus of Proof:

A golden thread of criminal justice in contemporary history is the requirement that it is for the prosecution to prove its case against an accused. Hence the constitution presumes a person innocent until proven guilty.

(See s. 137 Evidence Act and s. 33 1979 Constitution respectively)

See also the cases of: Woolminaton v. D.P.P, Are v. Commissioner of Police

The Buhari and Babangida Military decrees particularly the recovery of Public Property (Special Military Tribunals) Decree No. 3 of 1984 and its subsequent amendment placed the onus of proof that a PP person did not unjustly enrich himself on the public officer concerned. The burden of proving that a publication is true in every material particular shall be the person charged under the now-xxx repealed public officers (Protection Against False Accusation) Decree No. 4 of

1984; the Exchange Control (Anti-Sabotage) Decree No. 7 of 1994 xxx contained similar provision.

(ii) Evidence of Accomplice

Evidence of accomplice has traditionally been regarded as suspect because they have an interest to serve and may perjure themselves to gain advantage. The military have attacked this hallowed and earnestly reasonable criminal procedural law by allowing evidence of accomplice and requiring as a matter of law that such evidence be recorded due weight, the Recovery of Public Property (SMC) Decree No. 3 of 1984 has such a provision.

(iii) Excessive Punishment

There is also the issue of excessive and draconian punishment. It is the trend to hamstring the discretion of judges by imposing minimum penalty. For many offences as diverse as economic sabotage, examination malpractices etc to read maximum penalty meaning that judges may at their discretion now impose any sentence up to the maximum.

F.R.N v. David West (10 years was imposed). Later reduced to 'caution x and discharged').

F.R.N v. Richard Akinnubi (3 years imposed). The death penalty, fast going out of the fashion in many other parts of the world is widely adopted for armed robbery, treason and formerly drug trafficking.

(iv) Retrospective Criminalization

Retrospective criminalization offends all tenets of justice because it is tantamount to an offender being punished for an offence which was not a crime at the time he was committing the offence. The Recovery of Public Property (Special Military Tribunals) Decree No. 3, The exchange Control (Anti-Sabotage) is Decrees of the Obasanjo and Buhari Regimes and several others (Indeed it is the rule rather than an exception to have retrospective decrees).

IV. ARBITRARY GOVERNMENT

Military rule is often characterized by arbitrariness as the following illustrations may show.

(1) Governor Raji Rasaki was the quintessential military ruler - brash abrasive

"On March 2, 1990, Rasaki expressed support of the lynching of Armed Robbery suspects. Rasaki told Agege Council that "a jungle law demands jungle justice" (See CLC Publication: Lawlessness in the Babangida Regime P. 13

The MAROKO INCIDENT is another illustration of arbitrariness of government and utter contempt for the rule of law. Maroko is the slum settlement adjoining Victoria Island with about 300,000 inhabitants. On July 7, 1990, Governor Rasaki of Lagos state announced that the Maroko would be demolished in 7 days. No individual Notices to quit was given. Despite desperate attempts by the Civil Liberties Organization (CLC) on behalf of the Maroko community Rasaki's builders went into action leaving Maroko residents homeless. The courts had refused to exercise jurisdiction over court actions:

Justice Eniola Longe of Ikeja High Court

Justice Odunowo of Federal High Court

Muri Okunola accepted jurisdiction, visited Maroko and promptly threw up his hands in defeat on the grounds that the action complained of had already been done. The Court of Appeal on February 11, 1991 later issued an interim injunction restraining the Lagos state Government from reallocating the land until the final determination of the case but all indications are that this had already been done, as borne out by the press statement of the new civilian Governor Micheal Otedola of 18th of January, who threatened to revoke the Certificate of Occupancy wrongly obtained in respect of Victoria Island, Lekki Peninsula and Maroko.

(ii) Better Life Programme:

In Fawehinmi v. President of Nigeria

Maryann Babangida

A Lagos based Legal practitioner and human rights activists Chief Gani Fawehinmi challenged the unauthorized use of public funds on the pet project of the First Lady – the Better Life Programme. Gani had asserted that there was no Legal or constitutional basis for the post of First Lady and therefore any expenditure of public funds by her is illegal. Justice Ope-Agbe of Lagos State High Court dismissed the action on the grounds that Gani lacked locus standi to institute the action.

However, the illegality of the whole programme was demonstrated when government later promulgated the National Commission for Women Decree No. 30 of 1989 (See Lawlessness by CLO).

(iii) Aikhonu's Change of Status and Promotion

In August 1990, the Federal government announced that the nation's number two position would no longer be Chief of General Staff but Vice-President. Aikhonu retired and was appointed as vice-president. Not until October 13, 1990 did the FMG promulgate Executive Power Constitutional Amendments etc) Decree No. 28 of 1990 which legally created the office of the vice-president. Meanwhile Decree No. 24 had been passed amending the state security (Detention of Persons) Decree No. 2 and authorizing the vice-president (an office not yet created) to sign detention orders. As Justice Owobiyi of Lagos High Court pointed out in the case of Gloria Mawarin v. Chief of General staff the attempt to legalise Gloria's (coup suspect, Alex Africe's girl-friend on the basis of decree No. 24 of 1990 amounted to a legislative absurdity. He observed that the decree was promulgated before Decree No. 28 of 1990 which created the office of vice-president. (Lawlessness by CLO p. 16).

The same vice-president, Aikhomi amongst others were later promoted to the post of Admiral despite his retirement.

CONCLUSION

Military rule has been in direct conflict with the Rule of Law in Nigeria.